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Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 324.

TEXAS AND PACIFIC RAILWAY CO.,
Plaintiff in Error,

vs.

ABE REHYMER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ABE REHYMER.

CONE JOHNSON,
Attorney for Defendant in Error.

No. 224.

TEXAS AND PACIFIC RAILWAY CO.,

Plaintiff in Error,

vs.

Abe Behymer.

BRIEF FOR DEFENDANT IN ERROR.

Defendant in Error, Abe Behymer, was injured while serving Plaintiff in Error, Texas and Pacific Railway Company, as brakeman on one of its freight trains, by being thrown from the top of a car. He sought to recover on two grounds of negligence, towit: the negligence of the engineer handling the cars in stopping the same suddenly and with great violence, thus causing Behymer, who was on top of the cars performing his duties, to lose his balance and fall from the car; also, that a spike had been negligently left protruding from the foot board on top the car, on which the pants of Behymer caught while he was trying to regain his balance, lost by the sudden stopping of the car, and which caused him to fall and be injured.

He sought to recover, also, on the ground of the

alleged negligent mistreatment of his injuries by the Company's Surgeon at its hospital. But, a demurrer to this ground of recovery having been sustained, the same was abandoned.

In addition to the statement made by Plaintiff in Error, the Court's attention is called to the following facts established by the evidence:

1. The tops of the cars were incased in ice, and this the engineer handling the engine and cars knew (Tr. p. 62).

2. The engineer knew that one of the brakemen was on top of the cars, moving from one to the other (Tr. p. 62).

3. The engineer knew that it was difficult for one to remain or work on top of the cars in their icy condition (Tr. p. 62).

4. The engineer stopped the cars suddenly, by the use of the air brake, which caused the cars to run forward and against each other violently and then to rebound; whereas, if he had only shut off the steam, the train, which was moving up-grade, would soon have stopped of its own weight, and the bumping and jerking of the cars would have been avoided (Tr. p 61—).

5. In stopping the cars the engineer made no allowance for, and did not take into consideration, the fact that the cars were covered with ice (Tr. p. 61-62).

6. It was shown that this sudden stopping and

jerking of the cars was not necessarily incident to their operation; on the contrary, there was an easy and safe manner in which they could have been handled without jerking and bumping them to gether. The engineer testified that if he had cut off the steam and let the train roll it would have stopped of its own weight, it being up-grade; but he "did not choose to let it roll", but applied the air and stopped suddenly (Tr. p. 62-63).

7. There was no evidence that the stop made on this occasion was the usual one made under like conditions; but the testimony for the Company on that point was that there was nothing unusual in the stop, and that the Engineer acted as he ordinarily did when the weather was good and there was no ice. There was testimony by one of the operatives of the train that "they sometimes stop that way and sometimes make a good, easy, stop" (Tr. p. 69).

Williams, one of the Company's employes, testified that the only difference between making an easy and a sudden stop was that the former required a little more time (Tr. p. 73).

One of the train operatives gave as the reason for making such sudden stop that the train crew were paid by the mile, and were in a hurry to get over the road (Tr. p. 69).

8. There was testimony establishing that a spike had been left protruding in the foot board

which extended along the top of the car for the brakemen to walk on, and on this the pants of Behymer caught while he was slipping and staggering from the jerking and bumping of the cars, which threw him (Tr. p. 33-34). This issue was submitted to the jury under instructions by the Court which are not assailed or complained of by the Plaintiff in Error.

The points involved in this case will be grouped, for the purposes of this brief, under the following heads:

I

The peremptory instruction requested by the Railway Company.

II

The negligence of the engineer, and the risk assumed by Behymer.

III

The question of contributory negligence.

IV

The duty of the injured party to use care to heal his injuries.

V

The questions of the sufficiency and weight of the testimony and the amount of the verdict cannot be reviewed, and will be considered in this brief incidentally, only.

I

The general instruction to find for the railway company, requested by Plaintiff in Error, was properly refused for the reason, if for no other, that there was evidence to show that the Defendant Company was negligent in regard to the spike protruding from the roof of the car from which Behymer fell, and which caused or contributed to cause his injury. This issue was properly before the jury and could not be withdrawn by the general charge requested by the Defendant Company.

Behymer testified that when the cars were pulled out of the side track on to the main track the Engineer stopped the train suddenly and he was thereby thrown off his balance, and while he was trying to regain his balance the bottom of his pants caught on a protruding spike or nail in the foot board, which threw him down; that the spike was near the end of the car and protruded about two inches; that he had not been on top of the car before that time, and was not aware of the spike, and saw it only a second or so before it caught his pants (Tr. p. 34). The pants, with the leg torn, were exhibited in evidence, and Behymer's mother testified that she observed the torn place on the morning of the injury while Behymer was enroute to the hospital, and that the pants were not torn when he left home that morning (Tr. pp. 47, 48, 49).

The general instruction requested by the Defendant Company was properly refused, because it sought to withdraw from the jury the issue of the Defendant's negligence with reference to the protruding spike, as well as all other issues.

II

Counter-Proposition relating to the specifications of error on the point of assumed risk:

The employe assumes the risk from dangers ordinarily incident to the service engaged in by him; but he does not assume the risk arising from the negligence of the master, or of other employes for whose negligence toward him the master is liable. At Common Law he was held to assume the risk arising from the negligence of his fellow servant; but the Statue of Texas makes the railway company liable to its employe for injuries caused by the negligence of any other servant operating its engines or cars, and brakemen do not assume the risk arising from the negligence of the engineer. The question is, was the act of the engineer negligence under the circumstances. If so, the same was the negligence of the master, the risk from which Behymer did not assume.

Neither does the employe assume the risk arising from extraordinary danger. An unusual condition existing which increased Beyhmer's peril, it was the engineer's duty to use care propor-

tionate to the danger; and Behymer had the right to expect that such care would be used, and that his perilous position would be regarded.

The question was properly submitted to the Jury under instructions which fully protected the company and permitted a recovery only in the event Behymer was injured from the manner in which the cars were handled and that such manner of handling the cars was negligent.

We quote so much of the testimony as serves to illustrate the point involved:

THE PLAINTIFF testified:

"The engineer pulled the cars west after he coupled on to them; they were pulled out (to) the main line; he moved the cars after I released the brakes; that was the usual and proper way of moving the cars, that is, to move them after I had released the brakes; he carried those cars out of the siding about 12 or 14 car lengths I guess; carried them on to the main line; don't think all the cars were out of the switch at the time he stopped the cars; he made a quick stop; the sudden stop of the cars made the slack run up to the engine and jerked the cars on the rear end. That stop did not have very much effect on me; it staggered me a little bit. I was on the car next to the last one at the time the cars were stopped; standing up on the cars, on the foot board; guess I was 8 or 10 feet from the east end of the car. When the engine

stopped that had the effect of making the cars run forward on account of the slack, or making them bump against the engine. The engine jerked again and that kinder gave me another jerk. I mean by that I suppose the engine was pulling them out of the siding. They were not out of the siding and he opened the engine to pull out in the clear, and when he opened the engine it jerked the cars again. The jerking of the cars threw me off my balance. The cars started the second time; he started them with a jerk, a sudden jerk; it was a pretty good jerk. I mean it was a good heavy jerk. I don't know that I lost my balance entirely by reason of the first jerk of the cars; I think it staggered me.

Q. I will ask you again whether the first stopping of the cars caused you to lose your balance or not?—A. Yes sir.

The second jerk of the cars was made almost instantly. I had not recovered my balance at the time the second jerk was made. The effect which a sudden stop of a train of cars has upon the cars in the train is to run the cars toward the engine; the slack in between them causes that * * * When the train is stopped suddenly the cars run forward. The other effect from a sudden stop except the running forward of the cars is that they bound back; at that place because it was down hill; suppose you would call that a rebound. The en-

gineer of that train stopped those cars by a sudden stop. The cars run forward quick and sudden; just as quick as they could" (Tr. pp. 40, 41).

On cross-examination he said:

"I suppose the ice was about a quarter of an inch thick on top of the cars that morning. It had been snowing and sleeting that morning after we came out of Longview; it was raining and freezing, and about a quarter of an inch of ice was on top of the cars" (Tr. p. 44). "The car I fell off of was one of the two rear cars, they were the two rear cars of the train. After I had gone about five cars they coupled on to the engine and moved west with the whole string. I was getting back to where I could let off the brakes on these cars and be there to ride them down when they cut them off. * * * The rear car had not reached the crossing; that is why, I think, the engineer gave a jerk, when he saw he wasn't in the clear he opened the engine up. It was not my business to signal when he was in the clear. The man at the switch does that (Tr. p. 45). The jerk of the car is what started me and couldn't regain my balance because the jerk was too heavy. The slippery character of the car kept me from regaining my balance some. I don't think I got off the running board at all. I know I didn't. It was the first stopping of the train and the running together of the cars that caused me to lose my balance. I lost

my balance when they first stopped, and when the cars went down the grade that helped me on and threw me down. I first staggered back when the train stopped. I staggered toward the other end of the car, and then when they went back it, jerked me over the other way toward the end of the car. I think I would have had trouble in holding my balance on top of that car if it had not been for the ice; the jerk I am confident would have thrown me. I think it would have thrown me to the other car, I don't know whether I would have fallen down on the ground or not" (Tr. p. 46).

J. A. KEY, conductor of the train, testified:

"The engine had run up west and had the signal to stop, and had stopped, and the slack came back; after he had lost his balance about the only move the cars made was the slack running out. That was after he lost his balance. I saw him fall on top of the car, and knew the top of the car was so slippery he couldn't stay on it; there was no way for him to stay up there because it was so slippery he couldn't hold on" (Tr. p. 51).

"I saw the train when it stopped. When the engine stopped of course the cars behind the engine went on forward and bumped up against the others and then the slack run back out. He lost his balance when the cars bumped up against each other, and he fell as the slack run out. They were moving about 7 or 8 miles an hour in going

out of the switch. If these cars had been pulled out of the switch slowly there would have been little slack in the train. When you are pulling a train there is no slack in it; it is all stretched out. It depends altogether on the speed the train is going as to whether the slack will run up against the engine or not.

Q. So, then, it could be run at a speed which the cars would not have bumped?—A. The engineer could have run up there at such a rate that the cars would have stopped themselves. That was not done that day, he applied the air on the engine very little; the train stoppod as if he had put the air on his engine; putting the air on the engine is what caused those cars to bump up against one an other; what caused the slack to come back was that they had run up together and closed up the slack. He could have pulled that train up there slow enough for the cars to have stopped themselves. He did that day just like he usually does. He stopped the cars just like he usually stops them in good weather; stopped them just as if there had been no ice on top of the car; the engineer made no allowance for the fact that the tops of the cars were incased in ice, that I took any notice of. I suppose the engineer knew the condition of the weather; there was nothing to prevent him from knowing the condition of the weather that I know of. He could tell it was raining and freezing. There was

no difference that morning so far as I could see in the way he operated the train then and the way he operated it when the weather was goood. The fact that the top of a car is incased with ice makes it more difficult to keep your balacce" [Tr. p. 53, 54].

C. A. Smith, the engineer, testified:

"I made the usual stop; just stopped when I got the signal to stop. I had air on the engine and applied it to the engine to stop." (Tr. p. 61).

"It is possible that those cars could have been pulled up in such a manner that the weight of the train would have stopped itself. If I had cut the steam off my engine and let the train roll far enough the weight of it would have stopped it. I did not choose to let it roll. I shut off the steam and put on the air and made my stop. When you want to stop an engine you cut the steam off and apply the air brakes to the engine. That causes the cars to come against each other, and then the weight of the cars pulls them back and pulls the slack out of the train. If I let it go to a stop itself the cars would come on up and the momentum of the cars would go back just the same and pull me back. What makes the slack is that the engine is stopped before the cars are and they bump up against each other and then the slack pulls out. I was not running as fast that morning as I would run on level track. The condition of the weather and the tops of the cars had nothing to do with my

stop at all. There was nothing to take into consideration. In making that stop I can't say that I took into consideration or made any allowance for the condition of the weather or the tops of the cars. I knew there was ice on the tops of the cars; there was ice everywhere. I understood at that time that it was more difficult for a man to operate on top of a car covered with ice than it was on one not covered with ice. (Tr. pp. 61, 62).

"I knew there was a man on top of the cars. * * * It was necessary for Behymer to ride those cars out of the switch in order to ride them back down the main line; he was at his proper place of duty." (Tr. p. 62).

B. T. STELSON, a brakeman, testified:

"There was nothing unusual in the motion of the slack running out of that train. The slack always runs back down grade; the engine was not stopped any more sudden than it ordinarily is." (Tr. p. 67).

On cross-examination, he said:

"The engineer did not make any allowance for the condition of the weather and sleet being on the cars, but just went ahead with the switching; made no allowance for that at all." (Tr. p. 68).

"He stopped so the cars behind the engine ran up against each other; they do that nearly every time they stop and then the slack runs back the other way. There was no difference in the stop

that morning and the usual stop. They sometimes stop that way and sometimes make a good, easy stop. This was a sudden stop. Q. Was it not possible to pull those cars out of the switch and the engineer cut off his steam and allow the train to have slowed down by its own motion, and therefore not have the bumping of it? A. Yes sir; we could have done that but we would never get over the road. We always hurry as fast as we can. The employees are paid by the mile and the time they are out. It would have been very hard to have pulled that train out of that switch in such a way that the slack would not have run forward and then back. He could have pulled it out there and let the weight of the train stop itself, still the slack would have run back. He could hardly have stopped the train so gradually that the slack would not have run forward. It was more dangerous to walk on the cars incased with ice than one that is not." (Tr. p. 69).

H. A. WILLIAMS, agent at Big Sandy, testified:

"I saw him when he first began to fall; the train was pulling up and about the time it stopped he seemed to lose his footing, and seemed to be slipping on account of the ice being on top of the car, and the train stopped but he just kept going and went down between the cars, and the next I saw he was scrambling out from between the cars." (Tr. p 70).

On cross-examination he said:

"The train stopped suddenly enough for the cars to run forward and bump up against the engine and each other. The slack run back; there is a considerable grade at Big Sandy. I have been agent there six and a half years, and have observed the switching there about the depot and depot grounds. It is possible for those cars to have been pulled out of that siding on to the main line and the engine and cars stopped gradually so that the rear cars would not bump up against each other. The only difference in that and stopping them suddenly is the saving in the time; it would consume a little more time to stop them gradually. The engine and cars were stopped about the usual way that morning. That stop was about the ordinary stop" (Tr. p. 73).

The Court instructed the jury on the question of the risk assumed:

"A person entering into the employ of a railroad in the capacity of a brakeman assumes certain risks. He assumes the risks that are incident to the emoloyment. In other words, that employment is dangerous from the nature of it. A person is liable to get hurt. A party entering that employment, and is injured while in the employment, is debarred from a recovery in the event he is injured except where he can show by the evidence that it was due to no act of his, but was the

result of negligence of other parties" (Tr. p. 106).

At the request of Plaintiff in Error the Court gave the following special instructions:

"You are further charged that in taking employment a brakeman assumes all risks neccssarily incident to his employment, and if you should believe from the evidence in this case that plaintiff was injured by being exposed to the risk necessarily incident to his employment, he can not recover" (Tr. p. 112).

"You are further charged that where one voluntarily enters into a contract of hiring with the railroad company and assumes all the risks and hazzards ordinarily and usually incident to such employment he will be presumed to have contracted with reference to such risk and hazzard." (Tr. p. 112). The Court instructed the Jury in the same connection as follows: "While the employe assumes the risk ordinarily incident to his employment he does not assume the risks which may be occasioned or caused by the negligence of the other employees operating the train." (Tr. p. 113). And at the request of plaintiff in error, the following:

"You are further charged that if you believe from the evidence that the cars from which the plaintiff fell were covered with sleet and ice, and that fact was known to plaintiff, and if plaintiff knew that walking upon the cars in that condition

was dangerous, then, although you may believe from the evidence that he was told by the conductor to go upon the top of the cars and set or loose the brakes, he was not obliged to do so, and if he did so with the knowledge that their condition rendered it dangerous to him in moving the cars, he will be held to have assumed the risk of all such dangers, and if his injuries were caused by such condition of the cars (and not by the negligence of those operating them, if any,) he can not recover for any injuries occasioned thereby." (Tr. p. 114).

The Jury were also instructed:

"Upon that phase of the case you are instructed that you are to determine from all the evidence what caused the plaintiff to fall. If he fell because of the condition of the top of the cars, and the car was being handled with the degree of care that an ordinarily prudent person would handle cars, and that he slipped and fell on account of the condition of the ice, and that was the cause of the fall, plaintiff would not have a cause of action, and you will find for the defendant" (Tr. p. 107).

Also as follows:

The question for you to determine is, under the facts of this particular case and under all the evidence introduced, did the parties in charge of the train use ordinary care in handling it, in so far as their duty required, to avoid injuring any one;

that is, did the operatives in charge of the train, as to starting it or stopping it, use the degree of care that a person of ordinary prudence would use in that business under the circumstances? If they used the degree of care that an ordinarily prudent person under the circumstances would have used, then the ground of negligence would fall, and plaintiff would not be entitled to recover upon that ground" (Tr. p. 105).

"Therefore, gentlemen, it is one of the disputed questions of fact in this case that you are to determine from all the evidence offered, both by the plaintiff and the defendant, applying the rule that I gave you in charge as the law of the case. That is, if from the evidence it appears that the parties in charge of the train used ordinary care, as defined, that is, the care that an ordinarily prudent person under like circumstances would have used, then, *even if plaintiff was hurt by the movement of the train*, (if the moving was done in the manner an ordinarily prudent person would have done) then he can not recover; but if they failed to use ordinary care, as defined, that is, such care as an ordinarily prudent person under the circumstances would have used, and the plaintiff was, without his fault, injured, he can reeover." (Tr. p. 105).

The testimony shows that the tops of the cars were covered with a thick coat of ice; that the Engineer was aware of this condition, as he was also

aware that Behymer was on top of the cars operating the brakes and passing from one car to another, and that on account of the conditions Behymer's danger was great and extraordinary. He made no allowance for the condition of the cars but, knowing Behymer's great danger, the Engineer, without necessity, stopped the train suddenly and with great violence. It is not insisted by Plaintiff in Error that there was any necessity or urgency for the cars to be so handled. They could have been handled without difficulty or effort in a manner which would have prevented the bumping or jerking of the cars. The reason assigned for handling them as they were was, as expressed by one of the operatives, the men were paid by the mile and hurried to get over the road, or, as expressed by another, the difference between making an easy stop and the one that was made was that the former required a little more time; while the reason given by the Engineer was that he "did not choose to let them roll".

Under the Texas Statute the Engineer stood in the place of the master. Was it not the duty of the master, knowing the peril of its servant, to use reasonable care to avoid injuring him? As is said in Railway Company vs. Watts, 63 Tex. 552, "where the employee is engaged in a dangerous service it is the duty of the master to use all reasonable and necessary means to protect him against

any superadded danger that might be reasonably expected to arise from extrinsic causes. In such cases the greater the peril to the servant on account of the nature of the service, so also, the greater the degree of care and prudence exacted of the master in protecting him against an increase of the danger arising from extrinsic causes".

The duty of the master to the servant is a varying one, to be measured by the circumstances of the case, the danger to the employe and the consequences to follow from a failure to exercise care.

The reply of the Plaintiff in Error to all this is, that it is immaterial whether the Engineer's conduct was negligent; that it has answered Plaintiff's case by showing that the cars were handled as they were ordinarily handled under other conditions, when the weather was good and the cars were not covered with ice. As was said in Wabash Rwy. Co., vs. McDaniel, 107 U. S. 454, in speaking of the risk assumed by the employee and of the master's duty to him, "to say as matter of law that a railroad corporation discharged its obligation to an employee (in respect of the fitness of co-employees whose negligence has caused him to be injured) by exercising not that degree of care which ought to have been observed, but only such as like corporations are accustomed to observe, would go far toward relieving them of all responsibility," etc. "If the general practice of such corporations in the

appointment of servants is evidence which a Jury may consider in determining whether in the particular case the requisite degree of care was observed, such practice can not be taken as conclusive upon the inquiry as to the care which ought to have been exercised. A degree of care ordinarily exercised in such matters may not be due or reasonable or proper care, and therefore not ordinary care within the meaning of the law."

The testimony relied upon by plaintiff in error to establish that the stop made was the ordinary incident to the operation of the train was very meagre, and fell far short of establishing that the method of handling the cars on this occasion was the one usually employed on its road. As the evidence on this point is brief, we will quote it: Stelson, a brakeman, said: "The engine was not stopped any more sudden than it ordinarily is."

Key, the conductor, said: "There was no difference that morning, so far as I could see, in the way he operated the train then and the way he operated it when the weather was good".

Williams, the station agent, said: "The engine and cars were stopped about the usual way that morning. That stop was about the ordinary stop."

Smith, the engineer, said: "I made the usual stop; just stopped when I got the signal to stop. I had air on the engine and applied it to the engine to stop".

Stelson, the brakemen, also said: "They sometimes stop that way and sometimes make a good easy stop; this was a sudden stop".

This constitutes the testimony on the point of comparison of the stopping and handling of the cars on the occasion in question with the usual method of so doing. Whether by the "usual stop" the witnesses meant the stops usually made at that place or on the line of the road, or whether it was the usual stop made by that engineer or other engineers, is not explained.

Nor was it shown that Behymer was aware of such custom or method obtaining; he was inexperienced in railroading; had made only four trips on the road, and this was his second trip over that portion of it (Tr. p. 39). He was directed by the conductor to go into this place of danger, and it was necessary for some of the brakemen to perform this service (Tr. p. 37, 39). The Engineer closed his eyes to the situation, and, disregardful of the young man's danger, handled the cars in a manner which under more favorable conditions might properly be said to be negligent, and which, under the circumstances then existing, was not short of recklessness. The railway company says that a sufficient reply to this is that we usually did it that way. This would be a cruel application of the doctrine of assumed risk.

Authorities:

Hough vs. T. & P. Ry. Co., 100 U. S. 213;
Ry. Co. vs. McDaniel, 107 U. S. 454;
T. & P. Ry. Co. vs. Archibald, 170 U. S. 671;
Pantzer vs. Mining Co., 99 New York, 368;
Hosic vs. Ry. Co., 75 Iowa, 683;
Ry. Co. vs. Rowan, 104 Ind., 94;
Ry. Co. vs. Voss, 18 S. W. Rep. 172 (Mo).
Ry. Co. vs. Watts, 63 Tex. 552;
Moran vs. Harris, 63 Iowa, 390;
Pauck vs. Provision Co., 61 S. W. Rep. 806;
Lalor vs. Ry. Co. 52 Ill., 401;
Chicago Drop Forge Co. vs. Vandam, 149 Ill. 337;
Jones vs. Ry. Co., 49 Mich. 573;
Electric Co. vs. Lubbers, 11 Colo , 505;
Bayley's Personal Injuries, Vol. 1, Sec. 463, 467, 471, 473, 537 and 578a;
Buswell on Personal Injuries, Sec. 207, 211.

Revised Statutes of Texas, Art. 4560 F: "Every corporation operating a railroad the line of which shall be situated in whole or in part in this State shall be liable for all damages sustained by any servant or employe thereof while engaged in operating the cars, locomotives or trains of such corporations, by reason of the negligence of any other servant or employe of such corporation, and the fact that such servants or employes were fellow

servants with each other shall not impair or destroy such liability."

Art. 4560 I: "No contract made between the employer and employe based upon the contingency of death or injury of the employe and limiting the liability of the employer under this chapter or fixing damages to be recovered shall be valid or binding".

Second Counter Proposition on the Point of Assumed Risk:

At the request of Plaintiff in Error the Court instructed the jury that if Behymer knew that the cars were covered with ice, then he would be held to have assumed the risk of the danger arising from such condition, although he went upon the cars by direction of the conductor; and if his injuries were caused by the condition of the cars he could not recover.

The Court correctly ingrafted upon such instruction the qualification, "and not by the negligence of those operating the cars;" for that, though Plaintiff be held to have assumed the risk arising from the icy condition of the cars and could not recover if his injuries were caused by such condition, still he could recover if his injuries were caused by negligence in handling the cars, even though the condition of the cars (which danger he assumed) contributed to his injuries.

The general charge of the Court as well as the special instruction given on this point has already been set out, page——of this brief. These charges made clear that if plaintiff was injured by reason of the icy condition of the cars, that is, if he slipped and fell on account of the ice, he could not recover. The complaint of the plaintiff in error is that the Court inserted the qualification, "and not by the negligence of those operating the cars." Taken in connection with the main charge heretofore quoted, the words inserted by the Court were intended to leave to the Jury to "determine from all the evidence what caused the plaintiff to fall." But it is a familiar rule that an employe may recover where the negligence of the master contributes to cause the injury with other causes for which the master would not be liable, as, for instance, risk assumed.

Authorities:

III

Counter-Proposition on the point of contributory negligence:

The specification of error which attacks the Court's charge on contributory negligence is based

on a misapprehension of the charge. The Court defined contributory negligence as "the doing of an act that a man of ordinary prudence and caution would not have done under the circumstances, *which contributed to his injury*, or it consists in the failure to do an act that a man of ordinary care and prudence would have done under the circumstances. It means that if the plaintiff was negligent and the defendant was negligent no recovery can be had. It means that the defendant must have been negligent and the plaintiff not negligent."

This was a correct statement of the law, and is favorable to the plaintiff in error. In the absence of a requested instruction enlarging upon the question of contributory negligence no error was committed by the Court.

The Court instructed the jury on contributory negligence as above set forth (Tr. p. 109), and gave also the following special instruction No. 5, requested by Plaintiff in Error: "You are further charged that if at the time Plaintiff fell from the top of defendant's car he knew or by the use of reasonable diligence could have known that the tops of the cars were covered with ice and that such condition was dangerous to persons walking or working on top of said cars, then he will be held to the use of such care and caution to avoid injury

to himself commensurate with said condition, and if he failed to do so and was thereby injured he would be guilty of contributory negligence, and he can not recover damages against defendant for his injuries, even though you should believe from the evidence that defendant, its agents and servants, were also guilty of negligence contributing to the accident and injury" (Tr. p. 115).

Authorities:

IV

Counter-Proposition on the point of the duty of Behymer to have his injuries healed:

All that can be required of a party who has been injured by the negligence of another is that he use reasonable care to protect himself from the consequences of such injury—to use reasonable care in the treatment of his injuries. It can never be said as matter of law that the injured party must submit to a serious surgical operation; the law is that he use reasonable care to have his injuries healed; the question of fact is, has he used such care.

The Court having fully instructed the Jury that it was Behymer's duty to use reasonable care to

have his injuries healed and to submit to reasonable surgical operation, the law of the case was fully given, and as favorably to plaintiff in error as could be demanded.

The Court in its general charge instructed as follows: "It was the duty of plaintiff to use the care that a reasonably prudent person would have used in order to have his injury healed. It was his duty to submit to all medical or surgical treatment that a reasonably prudent person would have submitted to, and, therefore, if you find for the plaintiff you are to determine whether or not he has used the care that a reasonably prudent person would have used in order to have his wounds healed. If he did use such care that is the end of it. If he failed to use such care, and you find from the evidence that by having used such care his injuries could have been cured or could have been remedied, the rule is this: If they could have been cured in toto his recovery would be limited, if otherwise entitled to recover, to the original injury, and the mental and physical suffering and loss of time up to the time his injuries should have been healed by proper care. That is the case where it is a total cure. But if you find by proper care that his injuries could not have been totally cured, but could have been ameliorated or made better, then, in estimating damages you

could only estimate damages for the original injury, the physical and mental suffering and loss of time up to the time such treatment would have partially restored it and any reasonably amount for the rest of his life, in the event you find it was permanent." (Tr. p. 108).

And in the same connection the Court instructed the jury: "If by submitting to proper surgical treatment his leg could not have been totaliy cured but could have been made much better, then in estimating the damages you base it upon an improved condition of the leg and not upon its present condition; in other words, upon the basis of the condition of the limb if proper care had been taken. As stated, if it was a total cure you can allow only for the injuries up to the time it could have been cured, and to that point only", etc (Tr. p. 108).

And the Court also gave the special instruction No. 7 requested by Plaintiff in Error: "If you believe from the evidence that after Plaintiff left the hospital at Marshall a surgical operation could have been performed or can now be performed which would or would have restored his leg to its former condition of usefulness, *and that a reasonably prudent person would have submitted himself to such operation and the treatment afterward*, then the Plaintiff would not be entitled to recover any damages of defendant beyond an amount that

would reasonably compensate him for any impairment of his leg, if any, which remain after such operation and treatment, and beyond an amount which would reasonably compensate him for loss of time and mental and physical suffering arising from the original accident as the direct result thereof, though you should find that there was negligence on the part of Defendant, its agents or servants, causing the original injury, and that plaintiff was free from contributory negligence, as defined in other parts of this charge" (Tr. p. 115).

It will be seen from this special instruction that plaintiff in error invited the Court to instruct the Jury that the measure of plaintiff's duty was that care which a reasonably prudent person would have exercised; and if there was any error in this regard, which is denied, the same was invited.

The Court also gave instruction No. 6, requested by plaintiff in error, as set out in specification of error No. 16, the Court giving the same as requested, except to ingraft upon that portion of the charge requiring Behymer to follow the directions and submit himself to the treatment of the Company's surgeons the element of Behymer's negligence in failing so to do. The plaintiff in error by this instruction and by requested instruction No. 7, *supra*, invited the Court to the proposition that it was a question whether Behymer had exer-

cised reasonable care to have his injuries healed, and cannot complain that the Court applied the same rule in reference to the duty of Behymer to submit to the directions and treatment of the Company's surgeon.

Authorities:

Rwy. Co. vs. McMannewitz, 70 Tex. 76;
Cooper vs. City of Dallas, 83 Tex. 242;

The special instruction requested by plaintiff in error and given contained the principle that plaintiff was not debarred from recovery for his full injury on account of failure to have a surgical operation performed unless, under the circumstances, his failure to do so was negligence; and Plaintiff in Error can not complain that the Court ingrafted in the other special instruction requested by it (as to the alleged failure of Behymer to follow the treatment and instructions of the Company's surgeon) the element of Behymer's negligence in so failing to do.

The Court gave the special instruction requested by plaintiff in error that plaintiff could not recover for the condition of his leg if the same was caused by improper treatment or want of attention on the part of the Company's surgeon (Special instruction No. 3, Tr. p. 12), and the Court correctly

gave in connection therewith the instruction that though the plaintiff's injuries as they then existed may have been the result of improper treatment, yet he could recover for all the injuries occasioned by the original accident and all damages that he may have suffered or may hereafter suffer as the direct and proximate result of the original accident. These instructions taken in connection with the general charge fully instructed the Jury as to Behymer's duty with reference to his injuries, that it was his duty to use reasonable care to have them healed, to submit to all reasonable medical and surgical treatment, failing in which he could only recover for the original injury and for such condition of his leg as would have remained after such treatment and operation; and that he could not recover for any inattention or mistreatment of the Company's surgeons, and only for the direct and proximate result of the original injury. The qualification given with the Company's special instruction No. 3, that plaintiff could recover for the original injury, is in almost the same language as that employed in the Company's special instruction No. 2, given by the Court.

V.

This Court will not review questions of fact, but where there was evidence tending to support the verdict it must be assumed that all the facts were

correctly found by the Jury; nor will this Court determine on writ of error whether the verdict in an action for personal injuries was excessive.

Authorities:

New York Etc. Ry. Co. vs. winter, 143 U. S. 60;

Lincoln vs. Power, 151 U. S. 436;

Chicago & N. W. R. R. Co. vs. Ohle, 117 U. S. 123;

N. W. Etc. Packet Co. vs. McCue, 17 Wallace, 508;

United States Express Co. vs. Ware, 20 Wallace, 543.

As the plaintiff in error strenuously insisted in the Circuit Court of Appeals that the verdict was against the weight of the testimony and the damages excessive, and so insists in this Court, we recite so much of the facts as will show that the verdict of the Jury was a just one and that the damages assessed were in no sense excessive.

This cause was removed from the State to the Federal tribunal, where both parties might expect a fair trial, where local prejudice, influence or sympathy would not avail either party.

No testimony was offered or introduced in evidence to which plaintiff in error objected, and none of the testimony offered by it was rejected. The trial was a quiet and orderly one and the record

does not disclose that anything occurred in any manner calculated to prejudice or inflame the Jury, and no infllamatory remarks or improper conduct on the part of Behymer's attorneys is complained of.

The testimony of all the witnesses was to the effect that Behymer was injured while in the discharge of his duty; that he was at his proper place where it was necessary for him to be; that the tops of the cars were incased in ice, that plaintiff lost his balance by reason of the rough manner in which the cars were handled and that the slippery condition of the cars prevented him from regaining it; that the engineer knew at that time that the cars were covered with ice and that it was difficult for Behymer to remain and work upon the cars in that condition, that he shut his eyes to the conditions and stopped the cars suddenly and violently by the application of the air brake; that this manner of stopping the cars was not necessary nor was the same a necessary incident to the service; that the cars could have been stopped without difficulty or effort so as to have avoided the bumping and jerking, by cutting off the steam and permitting them to stop of their own weight, going up the grade; that the engineer made no allowance for the conditions, but handled the cars as he would have done under other conditions—when the weather was

good and the cars not covered with ice. Behymer was without fault or negligence.

Behymer was a young man 23 years of age. Both bones of his leg were broken between the knee and the foot, the bones being jabbed through the flesh. The suffering which he endured was intense; his injuries seri us and permanent, rendering him a cripple. At the time of the trial, which was a year after his injuries were sustained, his leg was still broken; the bones had not united and his limb was useless. He had remained in the Company's hospital for several months For all these injuries, his physical and mental suffering, loss of time and the impairment of his physical powers and ability to work, and for the hampered situation in which he is now placed he was entitled to recover such an amount as would reasonably compensate him. The Jury which heard all the testimony and saw the witnesses found that plaintiff was entitled to recover; they saw plaintiff's injuries and heard the testimony in relation thereto, and found his damages to be ten thousand dollars; the trial judge approved the verdict of the Jury when he overruled a motion for new trial. The verdict of the Jury is amply sustained by the testimony, which calls loudly for the affirmance of the judgment, unless the Court has committed a prejudicial error in its charge which will require a reversal.

Remarks:

We will briefly review a few of the cases on the point of the risk assumed by the employe:

In Hosick vs. Rwy Co., 75 Iowa, 683, the employe was injured by the Company's negligence in loading a car with machinery without providing it with a foot board, the car being placed in the train in such position that plaintiff must pass over it in the performance of his duties. In that case the Court said: "It is claimed by appellant that the car from which plaintiff fell was loaded in the manner *usual on its road*, and that it was not customary at that time, and never had been, to place foot boards over cars so loaded; that plaintiff knew these facts before he was employed by the defendant; and that by accepting service with that knowledge he assumed all risk and hazzard growing out of the manner of loading cars without foot boards". * * * "Under the charge of the Court the jury found that the defendant was negligent in not providing a foot board for the car in question. This being true, the fact that such negligence was usual or customary would not relieve defendant from liability for its consequences. We do not think the jury would have been justified in finding from the evidence that plaintiff assumed the risk alleged by the defendant".

The Court held in that case that the question was, whether plaintiff was guilty of contributory

negligence in attempting to pass over the car, knowing the condition and the danger of the attempt, and that the same was a question for the jury. This case is authority for the proposition that the servant does not assume the risk arising from the negligence of the master, and that no custom on the part of the master could justify his negligence.

In B. & O. Rwy. Co., vs. Rowan, 104 Ind., 94; defining the risk assumed by the employe, the Court said: "He who engages in the employment of another for the performance of specified duties takes upon himself the natural and ordinary risks and perils incident to the performance of such services. But there are well defined exceptions to this general rule, one of which arises from the obligation or duty of the master not to expose the servant while conducting his business, to perils or hazzards which might have been provided against by the exercise of due care on the part of the master."

In Moran vs. Harris, 73 Iowa, 390, the employee was injured while being hoisted in a shaft with machinery operated by the master. Speaking of the risk assumed by the employe, who, it appears, was familiar with the character and condition of the machinery, the Court said: "There was one element in this case which distinguishes it from the cases cited. Plaintiff was not em-

ployed to *work with the machinery*. He was engaged in the work of excavating the shaft, and had nothing whatever to do with operating the hoisting apparatus. Defendants undertook, themselves, the work of operating the machinery and they undertook to lower and hoist plaintiff by this means when he had occasion to enter the shaft or to leave it." * * * "If it be conceded that plaintiff assumed the risk of all such dangers as were created by the defects of the machinery it does not follow that defendants would not be liable for such injuries as might be occasioned by their negligence in the operation of the machinery or such as they could have prevented by the exercise of reasonable diligence and care. All that can be claimed is that plaintiff assumed the risk of such danger as might be occasioned by the defects in the machinery while being used in a reasonably prudent and careful manner. He did not assume the risk of such dangers as would be created by the careless or negligent manner in which the defendants might use the defective machinery".

So, in the case at bar, if it be said that plaintiff assumed the risk from the condition of the cars, covered with ice, he had nothing to do with their operation nor the manner of handling them; that was done by the master though the engineer, who was under the duty to handle the cars in reasonably prudent manner. Whether the engineer acted

with reasonable care is to be determined by the circumstances of the case, the danger to Behymer and the consequences reasonably to follow a failure to exercise such care.

In the case of Ry. Co. vs. Sims, 80 Ga., 749, cited by plaintiff in error, the question was not raised as to the charge of the Court; the principles and distinction of the law are not attempted to be given, and the case seems to have been decided upon a point of fact. The facts as testified by the engineer, in that case were: "On the occasion in question the train started off reasonably slow. Witness saw plaintiff go on the engine with a big load of wood in his arms or on his shoulder, etc. When the train was waived down it was going eight or nine miles an hour. Witness used all the care he could; did not jerk the train but pulled off very slowly etc. There was no jerk, unless a very slight one. Of course when it started there was some jerk, but the throttle of the engine worked nicely and it moved off gradually and gently. * * * In moving a train when the hands are working a man can walk all that is necessary without danger, but he does so at his own risk. If a man is careful he will be safe. It was gross carelessness that plaintiff fell." The conductor of the train testified that the plaintiff was not at his proper place, that he ought to have got on the platform and sat down, that there was danger in

walking on the train and in stepping from one car to another, that the engineer did all that could have been done, and that there were rocks and jerks of the train from irregularities in the track. On these facts the Court said: "The train being in motion, there was a jerk, and in attempting to step from one car to another or when about to make the step he was thrown from the car. We think that such jerks upon a train of that character must be expected to occur and that the risk of employment embraces them. It would certainly be impracticable to keep up the repairs of a railroad upon any very strict rule in regard to jerks in the movement of construction trains."

The only other case cited by plaintiff in error to which we have access is Auglin vs. T. & P. Ry. Co., 60 Fed. Rep. 553.

The controlling facts in that case were: Plaintiff was engaged in helping to move a dead engine which had to pass another engine on an adjoining track. The poximity of the engines was as apparent to plaintiff as to the others. He thought he could pass between them; he voluntarily took a position and continued in it till he was caught between the two engines. In their opinion the Circuit Court of Appeals say: "Plaintiff was an old, experienced railroad man, perfectly familiar with the movements of engines and had frequently assisted in moving engines in the same manner as

this one was being moved. The position of each engine was seen by him before he commenced, etc. He was not commanded or directed to work at any particular place at the engine, and the position taken by him was of his own choice and with full knowledge of the fact that said engine, as it would be moved forward, would come closer to the one standing on the other track, etc". He was held to have assumed the risk of being caught between the two engines. The decision could have been rested on the lack of negligence, for the Court say: "On the facts of the case the injury to the Plaintiff was not caused by any negligence of the general foremon or the foreman of the round house".

Citation of Additional Authorities:

Rwy. Co. vs. Ross, 112 U. S. 377.
Rwy. Co. vs. Teeter, 63 Fed Rep. 527.
Rwy. Co. vs. Johnston, 61 Fed Rep 738;
Rwy. Co. vs. Charless, 51 Fed Rep. 562;
Rwy. Co. vs. Obrien, 49 Fed Rep 538:
Cheatham vs. Red River Line, 56 Fed Rep, 249;
Rwy. Co. vs. Lafferty, 57 Fed Rep. 536;
Rwy. Co. vs. Brown, 57 Fed Rsp. 807;
Chicago etc. Rwy Co. vs. Stahley, 63 Fed Rep. 363;
Southerland vs. N. P. Rwy. Co. 43 Fed Rep. 646.

Rwy. Co. vs. Frazier, 34 S. W. Rep. 664 (Tex).
Rwy. Co. vs. Eberheart, 91 Tex. 324;
Rwy. Co. vs. Doyle, 49 Tex. 190;
Brown vs, Sullivan, 71 Tex. 476.
Rwy. Co. vs. Silliphant, 70 Tex. 624;
Rwy. Co. vs. Aylward, 79 Tex. 675.

Respectfully submitted,

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